

The Arbitration Act 1996: Time for Reform?

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Abstract

In 1989 the Departmental Advisory Committee on Arbitration Law (the DAC), recommended that England should not adopt the UNCITRAL Model Law of Arbitration (Model Law) and that, instead, there should be a new and improved Arbitration Act.

This article reviews the AA 1996 and the need for reform. It focuses on the main issues that have attracted judicial attention in the 21 years of its operation in England and other jurisdictions and draws conclusions from the judicial lessons learnt in other jurisdictions which have either enacted the Model Law per se or may have largely based the product of their legislative enactment on the Model Law. In the light of the above analysis, the article finally address the question of the suitability or not of the AA 1996, the question of whether the time for yet another reform has arrived and it also assesses the suitability of the Model Law.

1. INTRODUCTION

London has long been a leading hub for international commercial arbitration due to its pre-eminence as the centre for, *inter alia*, shipping, insurance, commodity, and financing businesses. Arbitration became ubiquitous in London, not least because of the volume of commercial transactions and, inevitably, of the disputes which occurred there as well as due to the existing traditional link between a centre of arbitration and the application of national law. Typically, it was more convenient for the arbitrator to apply the law of the country of which he was a national when required in arbitral proceedings. England, as the home of the common law, offered a familiar legal regime and has also acted as a host of specialists suitable to act as arbitrators. These factors placed London firmly on the map as an arbitration centre of choice for businesses the world over. Given the prominence of London as an international arbitration

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centre, it was essential that the law developed to cater for the needs of those choosing it as a seat.

The Arbitration Act 1996 (AA 1996) has been characterised as the closest thing to a definitive code of arbitration law that had ever been enacted in England and to a certain extent it has been inspired from the Model Law. However, the AA 1996 did not seek to codify the vast bulk of common law authority that had developed under earlier legislation and that, to some extent, remains applicable.¹ In addition, various matters which had been considered by the DAC Report did not ultimately find their way into the final legislation.² It is also suggested³ that it is not to be treated as a code in the continental sense as the legislation is far from exhaustive and since its passing there have been several hundred decided cases which lay down fundamental principles concerning the scope and application of the Act. Notwithstanding the above realisations, some 21 years after its enactment, the question arises as to whether there should be yet another reform.

Arbitration is the focal point of a systemic approach to promote homogeneity in the field of (alternative) dispute resolution. To this end, the work done by the United Nations in promoting the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and in the promulgation of the UNCITRAL Arbitration Rules, followed by the Model Law, has contributed a lot in achieving the above goal of homogeneity. It is now high time to consider the *modus operandi* of the AA 1996 as opposed to that of the Model Law. Is there urgent need for yet another law reform in arbitration in England? What is the background reason for such a reform? To what extent should this reform lead to the enactment of a law encapsulating the content of the Model Law provisions? Is the overarching need of today's global society and legal systems to let go of a plethora of fragmented national approaches and to promote and encourage the acceptance of a universally accepted legal regime such as the Model Law, enough to justify the latter as an optimal tool in an exercise for reform?

This article discusses whether time for yet another judicial reform in arbitration has arrived. As the overall discussion demonstrates, a reform would be essential in dealing with the deficiencies inherited via the AA 1996 and in approaching the well tested Model Law contents which are non-fragmented and largely followed in both the common law and civil law worlds.

¹ *Ibid.*

² *Ibid.*

³ For further reference, see R. Merkin L. Flannery, *Arbitration Act 1996*, 5th Ed., Informa Routledge, 2014.

2. DIFFERENCES BETWEEN THE AA 1996 AND THE UNCITRAL MODEL LAW (MODEL LAW)

Although the AA 1996 moved English law closer to the Model Law, there are many differences between them, the main being the following: a) the AA 1996 applies to all classes of arbitration whereas the Model Law is confined to international commercial arbitration; b) the former version of art. 7(2) of the AA 1996 required an arbitration agreement to be signed, whereas there is no such mention in the AA 1996 and the Model Law was amended in 2006 by the addition of an alternative version of art. 7(2) that did not require signature; c) where a matter is brought in the English courts, the court can only stay its own proceedings whereas the Model Law requires the court to refer the matter to arbitration; d) the AA 1996 specifies as a default tribunal that of a sole arbitrator whereas the Model Law requires a tribunal of three arbitrators as the default panel; e) where each party is required to appoint an arbitrator as per English law, the party retains its power to treat his arbitrator as the sole arbitrator where the other party has failed to make the appointment whereas under the Model Law there is no such or equivalent provision; f) a challenge to the appointment of an arbitrator has an exhaustive time bar of 15 days from appointment under the Model Law whereas under the AA 1996, subject to general principles of waiver there is no time bar for challenging the appointment of an arbitrator; g) under the Model Law parties choose the procedure for the arbitration with the arbitrators having default powers in the absence of an agreement, whereas under the AA 1996 the arbitrators have this right subject only to contrary agreement by the parties; h) the Model Law lays down strict rules for the exchange of proceedings, whereas under the AA 1996 the arbitrators decide how to proceed; i) the Model Law has no provision for the extension of agreed time limits for the commencement of proceedings; j) the Model Law has no mechanism for the summary enforcement of awards.⁴

The Model Law contains provisions that are autonomous and suitable for use in almost every kind of arbitration in every part of the world and deal with every aspect of arbitration.

The Model Law is characterized by many notable aspects. The first, is the importance of party autonomy accorded to all phases of the arbitration.⁵ The second notable aspect, is the right of parties and the arbitrators, not to apply the domestic law of the forum to the procedural aspects of the arbitration. Thirdly, the role of the courts in the arbitral process is severely

⁴ See Merkin & Flannery above, 3-4.

⁵ <http://www.sk.ua/publications/party-autonomy-vs-mandatory-rules-in-international-arbitration> (accessed 19 June 2017)

restricted. Their involvement is limited into the appointment of arbitrators where no agreement exists, into the hearing of challenges to arbitrators, into the replacement of arbitrators unwilling to act, into the determination of preliminary issues as to the jurisdiction of the arbitrators on appeal from their decision on the point, and into helping in obtaining evidence and the setting aside of awards on certain grounds.

3. THE AA 1996 – THE MAIN PROVISIONS IN NEED OF REFORM

Almost 21 years on from its drafting and coming into force, the logical questions that comes into the mind of academics and scholars, practitioners and policy shapers is whether the AA 1996 has proven to be fit for purpose, and if not which parts of it may urge the need for a reform, to which extent and for what reasons?

3.A. SECTION 30 OF THE AA 1996

S. 30 sets out two principles of English law which affect jurisdiction. The first is the right (unless removed by agreement of the parties) of the tribunal to consider its own jurisdiction (s. 30(1)). The second is the fact that any such ruling is subject to the ultimate say of the court (s. 30(2)). Issues of jurisdiction are too often conflated with issues of admissibility. In the context of section 30, however, the word refers to the arbitral tribunal's authority over the subject matter and the parties, in respect of a certain dispute that has been referred to it to adjudicate upon. Jurisdiction in this sense may encompass many aspects, and a strict definition of the term is quite elusive. *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd*,⁶ decided that the main contract and the obligation to arbitrate were distinct agreements, or rather, the court confirmed previous authority to that effect, and that, upon the condition that the arbitration clause was sufficiently widely worded, the arbitrators in principle would have the jurisdiction to determine whether the main agreement was valid. In this respect, the case qualifies as the first English judicial pronouncement of the civil law doctrine of “*Kompetenz-Kompetenz*”. In effect in *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd*,⁷ it was decided that the arbitration clause applied to a dispute regardless of whether the agreement in which it was embedded was void for initial

⁶ *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455.

⁷ *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455.

illegality. This presumption that illegality of the underlying contract destroys the effect and validity of the arbitration agreement (thus depriving the tribunal of any ability even to consider their own jurisdiction) had been made at first instance in *Fiona Trust v. Privalov & Ors*,⁸ before being overturned on appeal. In *Fiona Trust v. Privalov & Ors*,⁹ the Court of Appeal had come to accept that the common law had evolved to a point where an arbitration clause is a separate contract which survives the destruction or termination of the main contract.¹⁰ In effect, *Fiona Trust v. Privalov & Ors*,¹¹ highlights that where parties have agreed to arbitration, the arbitrators should be the first to consider whether there are any jurisdictional issues that need to be resolved. Hence, s. 30 adopted a version of the principle contained in art. 16 of the Model Law.

With regards to the issue of whether there is a valid arbitration agreement, the question may focus on the issue of whether the clause of arbitration has been incorporated into the contract or has been repudiated or whether it is invalid. *Fiona Trust v. Privalov & Ors*¹² apart, in *ABB Lummus Global Ltd v. Keppel Fels Ltd*,¹³ Clarke J. considered that the issue of repudiation of the arbitration agreement was an issue regarding validity of the agreement as per section 30(1). By contrast, an issue as to the validity of the underlying (matrix) contract is not an issue as to substantive jurisdiction and is not caught by section 30(1) whereas in *XL Insurance Ltd v. Owens Corning*,¹⁴ it was decided that it would be for the tribunal to rule on its validity. With regards to the issue of whether the arbitral tribunal has been properly constituted, in *Minermet SpA Milan v. Luckyfield Shipping Corporation SA*,¹⁵ a sole-arbitrator appointment stood as valid, however in *Sumukan Ltd v. Commonwealth Secretariat*,¹⁶ the improper constitution of the tribunal was considered as a substantial defect for the award to be set aside.

The critique that has been made over the years relates to the realisation that perhaps via s.30 AA 1996 we have effectively turned into too interventionist creatures in relation to Issues of jurisdiction and with regards to the extent of the arbitral tribunal's authority over the subject matter and the parties, in respect of a certain dispute that has been referred to it to adjudicate

⁸ *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm).

⁹ *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm).

¹⁰ In *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm) the Court of Appeal demonstrated the support of English courts for international commercial arbitration. The case confirms the separability of the arbitration clause from the main contract, even in situations where that contract was procured by bribery.

¹¹ *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm).

¹² *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm).

¹³ *ABB Lummus Global Ltd v. Keppel Fels Ltd* [1999] 2 Lloyd's Rep. 24

¹⁴ *XL Insurance Ltd v. Owens Corning* [2000] 1 Lloyd's Rep 500.

¹⁵ *Minermet SpA Milan v. Luckyfield Shipping Corporation SA* [2004] 2 Lloyd's Rep 348.

¹⁶ *Sumukan Ltd v. Commonwealth Secretariat* [2008] 1 Lloyd's Rep 40.

upon. Jurisdiction is peculiarly affected by the fact that arbitration is a creature of contract. Prior to *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd*,¹⁷ the main issue revolved around the question of whether an arbitration could proceed if the underlying contract was struck down as legally invalid. *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd*,¹⁸ decided that the main contract and the obligation to arbitrate were distinct agreements and if the arbitration clause was sufficiently widely worded, the arbitrators would have the jurisdiction to determine the validity of the main agreement was valid. Hence it is concluded that s.30 AA 1996 has adopted, in a modified form, the principle contained in art. 16 of the Model Law in that it is not mandatory and can be contracted out of by the parties. Hence, it is still open to the parties to enter into *ad hoc* agreements that confer such jurisdiction.¹⁹ However, the main difference between s. 30 AA and the Model Law is that the English provision seeks to define what constitutes jurisdiction.

The drafters of the AA 1996 clearly took a bold step in attempting to define jurisdiction. The Model Law does not define jurisdiction; it assumes the reader knows what is meant, albeit giving a wee clue by the words ‘including any objections with respect to the existence or validity of the arbitration agreement’.²⁰ However the drafters of the AA 1996 did not seek to make express definition of jurisdiction. In 2002 in *Mackley & Co v. Gosport Marina Ltd*,²¹ HHJ Richard Seymour QC thought, in relation to section 30(1)(c), that it was not plain beyond argument that a power to determine what matters have been submitted to arbitration in accordance with the arbitration agreement necessarily included a power to decide that nothing has. The argument that the categories whereby s. 30 applies are exhaustive, was dealt with initially in *Union Marine Classification Services LLC v. Govt of the Union of Cormoros*,²² and it was followed in *C v. D*.²³ In *ABB Lummus Global Ltd v. Keppel Fels Ltd*,²⁴ Clarke J. considered that the issue of repudiation of the arbitration agreement was an issue regarding validity of the agreement and, therefore, caught by section 30(1). By contrast, as per Colman J. in *Vee Networks Ltd v. Econet Wireless International Ltd*.²⁵ an issue as to the validity of the

¹⁷ *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd* [1993] 1 Lloyd’s Rep 455.

¹⁸ *Harbour Assurance Co Ltd v. Kansa General International Insurance Co Ltd* [1993] 1 Lloyd’s Rep 455.

¹⁹ *LG Caltex Gas Co Ltd v. China National Petroleum Co* [2001] 1 WLR 1892 (CA) where it was assumed that a ruling on jurisdiction reached under an *ad hoc* agreement specifically directed towards a jurisdictional issue could be challenged under s. 67 of the AA 1996, but would fail.

²⁰ UNCITRAL Model Law, Art. 16(1)

²¹ *Mackley & Co v. Gosport Marina Ltd* [2002] BLR 367 at [27].

²² *Union Marine Classification Services LLC v. Govt of the Union of Cormoros*, [2015] 2 Lloyd’s Rep 49 at [23].

²³ *C v. D* [2015] EWHC 2126 (Comm) at [135] (Carr J).

²⁴ *Lummus Global Ltd v. Keppel Fels Ltd* [1999] 2 Lloyd’s Rep. 24

²⁵ *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep 192

underlying (i.e. matrix) contract is not an issue as to substantive jurisdiction and is not caught by section 30(1). In *XL Insurance Ltd v. Owens Corning*,²⁶ Toulson J. decided that it would be for the tribunal to rule on its validity if the insured were challenging jurisdiction on that ground, and the anti-suit injunction was granted. In *Minermet SpA Milan v. Luckyfield Shipping Corporation SA*,²⁷ Cooke J. had to consider the question as to whether a sole arbitrator had been correctly appointed by default, the arbitrator having examined his own jurisdiction and concluded that he had been validly appointed. The challenge to the appointment failed, and the sole-arbitrator appointment stood. In *Sumukan Ltd v. Commonwealth Secretariat*,²⁸ the Court of Appeal considered that the improper constitution of the tribunal constituted a sufficiently sound jurisdictional defect for the award to be set aside. In *Crest Nicholson (Eastern) Ltd v. Western*,²⁹ there was no agreement to arbitrate, and it was held *obiter* by Akenhead J. that, where a contract specified one institution as the appointing authority, it was not open to the parties or one party to seek a nomination from another institution. In relation to s. 30(1)(c) AA 1996 it may be suggested that one only looks at what disputes have been submitted to arbitration by reference to the arbitration agreement. In *Gulf Import and Export Co v. Bunge SA*,³⁰ Flaux J., as he then was, considered that the word ‘matters’ in section 30(1)(c) referred to the claims that can be submitted to arbitration, not the way in which discretion is exercised in relation to a claim that has been validly submitted to arbitration.³¹

3.B. SECTIONS 67, 72 OF THE AA 1996

Under s. 67(3)(c) of the AA 1996 the court may, as an alternative to confirming the award or setting it aside, vary it or set it aside in part on jurisdictional grounds. On a s. 67 application, the court is not limited to reviewing the award, but may rehear the jurisdictional objection, with oral evidence if necessary, nor is the evidence that can be adduced before the court limited to that submitted to the arbitral tribunal. However, if evidence is late, it may attract a degree of skepticism and affect how the court deals with the costs. These are archetypal examples of the AA 1996 licensing the court to meddle in arbitral proceedings and emphasize

²⁶ *XL Insurance Ltd v. Owens Corning* [2000] 1 Lloyd’s Rep 500.

²⁷ *Sumukan Ltd v. Commonwealth Secretariat* [2004] 2 Lloyd’s Rep 348.

²⁸ *Crest Nicholson (Eastern) Ltd v. Western* [2008] 1 Lloyd’s Rep 40. In that case, the tribunal had not considered its own jurisdiction; the case was one where the discovery of the defect (the failure to consult member governments on the proposed appointments) was not made until after the award.

²⁹ *Crest Nicholson (Eastern) Ltd v. Western* [2008] 1 Lloyd’s Rep 40.

³⁰ *Gulf Import and Export Co v. Bunge SA* [2008] 1 Lloyd’s Rep 316.

³¹ For further reference, see Merkin & Flannery above.

the fact that it is open to the court to determine the exact extent of the tribunal's jurisdiction. All the above combined with ss. 67, 68 and 69 of the AA 1996 allows us to understand the reasons for which disappointed parties may rely on these articles to challenge arbitral awards for lack of jurisdiction (s. 67) or due to a serious defect of procedure (s. 68). The Model Law, via art. 34, provides for an arbitral award to be set aside in certain circumstances mainly different from those established by the AA 1996.

Challenging the tribunal's jurisdiction under s. 67 AA1996 will not necessarily result in a stay of the arbitral proceedings. An application of s. 67 AA 1996 may not prevent further, potentially unnecessary, costs being run up before the issue of jurisdiction has been determined, although it does at least prevent parties using s. 67 AA 1996 purely as a delaying tactic.³² It is also now common ground that a realistic challenge under s. 67 AA 1996 will require a full re-hearing, which can make such a challenge both expensive and time-consuming. The courts are however alive to this issue and in *B v. A*³³ Tomlinson J. tried as a preliminary issue the question of whether the claimants had a realistic prospect of success for a challenge under s. 67 AA 1996 and/or s. 68 AA 1996.

Section 67(1)(a) is applicable only if the tribunal makes an award on jurisdiction. In *LG Caltex Gas Co Ltd & Anr v China National Petroleum Corp & Anr*³⁴ it was stated that if the parties had specifically agreed that the tribunal should decide an issue going to its jurisdiction, such an agreement would be final and binding, so that, although a party would have a right to challenge the subsequent award on jurisdiction under section 67(1)(a), the challenge would fail.³⁵ The *LG Caltex Gas Co Ltd & Anr v China National Petroleum Corp & Anr*³⁶ award is one where the award was neither clearly a jurisdiction award nor a merits award. In *Vee Networks Ltd v Econet Wireless International Ltd*³⁷ Colman J ruled that an arbitration award which determined an issue that was determinative both of the substantive merits of the claim and of the arbitrator's substantive jurisdiction, but that did not expressly indicate that it was determining substantive jurisdiction, could in some circumstances amount to an implied award as to substantive jurisdiction and that the deciding factor was whether the issue of substantive jurisdiction had been specifically raised by either of the parties and referred for a decision, and

³² *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2011] All ER (D) 50 (Jun).

³³ *B v. A* [2010] EWHC 1626 (Comm), [2010] All ER (D) 08 (Jul).

³⁴ January 2001, Aikens J, unreported but transcript available on Westlaw; [2001] 1 WLR 1892 (CA).

³⁵ [2001] 1 WLR 1892 at [50]; note, however, that the comment here was made *obiter*, as, in the *Caltex* case, there was held on appeal to be no finding that any such agreement had been made.

³⁶ January 2001, Aikens J, unreported but transcript available on Westlaw; [2001] 1 WLR 1892 (CA).

³⁷ [2005] 1 Lloyd's Rep 192. See also *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] 1 Lloyd's Rep 495 (Gross J, as he then was).

whether the decision was in substance, if not in form, directed to that issue.³⁸ The ultimate rationale behind section 67 is that questions of both fact and law which affect jurisdiction should be within the right of appeal under section 67.³⁹ Hence in many cases, such as the in *Azov Shipping Co v Baltic Shipping Co (No 1)*,⁴⁰ it was argued that where a party seeks to challenge an award as to jurisdiction, the court should not be placed in a worse position than the arbitrators for the purpose of determining that challenge. Often in those re-hearings no winner appears.

The logical question to follow is whether the ‘re-hearing not review’ principle should apply in all cases. The principle of always letting the court have the last say should be treated with some care, as a major challenge within it is the inevitable duplication of cost and effort, which is also threatening the reputation of England as an arbitration-friendly jurisdiction.

However, where the jurisdictional issue is as to the complainant being a proper party to the arbitration, and that party either does not participate at all in the arbitral process or makes a very limited participation in the arbitration,⁴¹ in effect only to protest against its inclusion at all in the arbitration, such party must have the right to challenge any resulting award made against it, either by way of a challenge in the courts of the seat or by way of resisting enforcement elsewhere.⁴² In those circumstances, the award should be fully ‘reviewable’ by the courts of the seat⁴³ and the same applies where a party is not able to seek a preliminary ruling on jurisdiction. The above does not at all suggest that there should be an inflexible rule that the court must consider the matter of jurisdiction afresh in all circumstances, and by way of a rehearing even where there has been a full *inter partes* hearing before the tribunal.

In *Azov Shipping Co v Baltic Shipping Co (No 1)*,⁴⁴ where Azov was represented at the negotiations which resulted in an arbitration agreement, Azov challenged the arbitrator's award as to jurisdiction. Azov successfully applied to the court for a rehearing on the issue of the arbitrator's jurisdiction with full oral evidence pursuant to s. 67 AA 1996. In a separate hearing,

³⁸Ibid. at [31].

³⁹DAC Report, para 143.

⁴⁰ *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68 (Rix J); *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep 550; *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190; *Peoples' Insurance Co of China v Vysanthi Shipping Co Ltd* [2003] 2 Lloyd's Rep 617; *Peterson Farms Inc v C & M Farming Ltd* [2004] 1 Lloyd's Rep 603; *Metal Distributors (UK) Ltd v ZCCM Investment Holdings plc* [2005] 2 Lloyd's Rep 37; *Oceanografia SA de CV v DSND Subsea AS* [2007] 1 Lloyd's Rep 37; *Ases Havacilik Servis Ve Destek Hizmetleri AS v Delkor UK Ltd* [2013] 1 Lloyd's Rep 254.

⁴¹In effect, only to protest against its inclusion at all in the arbitration, because it did not consent at the time.

⁴²See the notes to Section 103.

⁴³ *Ases Havacilik Servis Ve Destek Hizmetleri AS v Delkor UK Ltd* [2013] 1 Lloyd's Rep 254.

⁴⁴ *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68.

it was then ordered to provide security for Baltic's costs of the application. At the rehearing, the court finally found that Azov was not a party to the agreement containing the arbitration clause. Accordingly, it held that the arbitrator did not have jurisdiction. The *Azov Shipping Co v Baltic Shipping Co (No 1)*⁴⁵ case is instructive insofar as the matter could have been dealt with at a single hearing before the court. It should have been clear that complex issues of jurisdiction would be raised, which could subsequently lead to the award being challenged on jurisdictional grounds. The parties should therefore have agreed at the outset to refer the issue of the arbitrator's jurisdiction to the court for determination of a preliminary point on jurisdiction pursuant to s. 32 AA 1996.

Cases such as *Zaporozhye Production Aluminium Plant Open Shareholders Society v Ashly Ltd*⁴⁶ or *The Kalisti*⁴⁷ show that the principle applies invariably. This is not right and it is regrettable that in many cases the award appears to be largely ignored.⁴⁸ The view supported to justify the rationale for the court to disregard the initial award is in cases where the award is harming the rights of the person challenging the award as the court will hear afresh the case and be more fair and independent. However, there have been voices raised against this practice as the court is not limited to reviewing the award, but may rehear the jurisdictional objection, with oral evidence if necessary, nor is the evidence that can be adduced before the court limited to that submitted to the arbitral tribunal, although, if evidence is adduced late, it may attract a degree of skepticism and affect how the court deals with costs.

In the case of an award as to the tribunal's substantive jurisdiction, the court can confirm the award, vary the award (in which case the variation takes effect as part of the award), or set the award aside in whole or in part. In the award is on the merits, the court can declare the award to be of no effect in whole or in part because the tribunal did not have substantive jurisdiction

In *Hussman (Europe) Ltd v. Ahmed Pharam*,⁴⁹ it was stated that there is no difference in principle or effect between a declaration that an award is of no effect in whole or in part and an order setting aside an award in whole or in part as the tribunal is no longer *functus officio* as regards the matters decided in the invalid award, and the arbitration continues or revives as necessary and in case of a revival of the tribunal's jurisdiction this is not dependent on the

⁴⁵ *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68.

⁴⁶ *Zaporozhye Production Aluminium Plant Open Shareholders Society v Ashly Ltd* [2002] EWHC 1410 (Comm)

⁴⁷ *Central Trading & Exports Ltd v Fioralba Shipping Co, The Kalisti* [2014] 2 Lloyd's Rep 449.

⁴⁸ R. Merkin L. Flannery, *Arbitration Act 1996*, 5th Ed., Informa Routledge, 2014.

⁴⁹ *Hussman (Europe) Ltd v. Ahmed Pharam* [2003] EWCA (Civ) 266 (Lawtel).

invalid award being remitted to it for reconsideration. However, the two remedies are different in that in the former case, the court can, if satisfied that the tribunal did not have jurisdiction to make the award in question, grant a declaration determining the jurisdictional question and that will, ordinarily, be the end of the jurisdictional dispute, whereas in the latter case, the court has no express power to grant such a declaration and can only set aside the tribunal's award. This leaves the question of the tribunal's jurisdiction in a state of uncertainty since, ordinarily, as in the case of a successful challenge for serious irregularity or appeal on a question of law, the setting aside of its award would necessitate the tribunal reconsidering the matter in the light of the court's determination, and making a new award – it being that award which binds the parties. It is difficult to believe that it was Parliament's intention that the tribunal would do this where the award set aside concerned its substantive jurisdiction, particularly if the reason why the award was set aside was because the court concluded that the tribunal did not have substantive jurisdiction. But, if not, why was the court not empowered on all s. 67 AA 1996 applications to grant the remedies normally associated with its determination of jurisdictional questions, declarations and injunctions? This could have been done by giving any party to arbitral proceedings the right to challenge either an award of the tribunal as to its substantive jurisdiction or an award on the merits by proceedings in court for a declaration as to the existence or extent of the tribunal's substantive jurisdiction, giving the court power, on such an application, to grant injunctions or other appropriate relief.⁵⁰ It may be that, in the absence of such a reform, the court could deal with the uncertainties over the remedies available under s. 67 AA 1996 and their effect by granting declarations as to the tribunal's jurisdiction and, if appropriate, injunctions under its inherent powers. The other two remedies do not assist in overcoming these difficulties. It is possible that Parliament considered that there was no need for the court to grant declaratory or injunctive relief on a challenge to a tribunal's award as to its substantive jurisdiction since it had power to vary that award to give effect to its own findings on the jurisdictional question. But this remedy, which is peculiar to English arbitral law, merely creates uncertainty about whether the determination is that of the court or the tribunal, as there are no mechanisms for the award to be physically rewritten to give effect to the court's variation. Courts in other jurisdictions may find difficulty in understanding how an award, which is the composite product of the deliberations of the tribunal and the court, could be recognised or enforced under the New York Convention. Confirmation of the award, it is

⁵⁰ P. Aeberli, *Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map*, *Arbitration International*, (2005) Vol. 21, No. 3, 259 -299, 267-269

difficult to see why this remedy was considered necessary or, if necessary, why it was not also provided for in the case of an unsuccessful application to declare an award on the merits of no effect.⁵¹

Another final route by which the tribunal's jurisdiction can be challenged is that provided by s. 72 AA 1996 as per which a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question the tribunal's substantive jurisdiction by applying to the court for a declaration, injunction or other appropriate relief. The key question to be determined herein is the exact point when a party will be said to have "taken part" in proceedings. *Broda Agro Trade (Cyprus) Limited v. Alfred C. Toepfer International GmbH*,⁵² is authority that both participation as to jurisdiction and participation as to the merits will take a party outside s. 72 AA 1996 and back into s. 67 AA 1996. By challenging the tribunal's jurisdiction under s. 72 AA 1996, a party also retains its right to challenge an award either under s. 67 AA 1996 or s. 68 AA 1996. However, this needs to be balanced against the possibility of the tribunal making adverse findings against the non-participating party, which might have been avoided had they participated in the proceedings. Lord Collins, in *Dallah Real Estate v. Government of Pakistan*,⁵³ supported the view that the consistent practice of the courts in England means that they will examine or re-examine for themselves the jurisdiction of arbitrators. However, s. 67 AA 1996 is probably best viewed as a mechanism of last resort. On the basis of a limited amount of reported cases, more s. 67 AA 1996 applications fail than succeed. Hence if a party is considering challenging a tribunal's jurisdiction, they need weigh up which route is best i.e. so as to save costs and get to court earlier under s. 32 AA 1996 if possible, or to apply under s. 67 AA 1996 once an award has been made and face the possibility of arbitral and court proceedings in tandem, or wait and apply under s. 72 AA 1996 reserving the right to apply under s. 67 AA 1996 if that challenge fails.⁵⁴ The decision appears to be in need of being finely balanced and prompts us to question whether those aspects of the AA 1996, discussed above, which divert from the Model Law have actually worked in practice. Case law shows that their function and utility is of limited value to the parties. Hence, a need for a rethink on them is highly topical, not least because, even more than in the case of s. 67, 72 AA 1996, in relation to s. 68 AA 1996 appeals, the case of body law suggests an attempt by

⁵¹ P. Aeberli, Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map, *Arbitration International*, (2005) Vol. 21, No. 3, 259 -299, 269-270.

⁵² *Broda Agro Trade (Cyprus) Limited v. Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100, [2011] 2 All ER (Comm) 327

⁵³ *Dallah Real Estate v. Government of Pakistan* [2010] UKSC 46, [2011] 1 All ER 485

⁵⁴ M. Tofalides & C Arthurs, *The right challenge*, *New Law Journal*, 9/3/2012, <https://www.newlawjournal.co.uk/content/right-challenge> (accessed 20 June 2017)

the parties to persuade the courts to grant leave to appeal on the basis of wrong factual and legal conclusions of the arbitral tribunal.

In *Sin Channel Asia Ltd v Dana Shipping & Trading Pte Singapore*⁵⁵ after an award was handed down in favour of the defendant, the claimant applied to court pursuant to s. 72 AA 1996 for a declaration that the tribunal had not been properly constituted. Eder J held that an application under s. 72 AA 1996 does not have to be brought before an award is made. He highlighted that service of a notice to commence arbitration is an important step which has significant legal consequences. Accordingly, even where an employee or agent has a wide general authority to act on behalf of his employer/principal, such authority does not (without more) generally include an authority to accept service of a notice of arbitration, and he held that where an arbitral tribunal is not properly constituted, a party who has not participated in the arbitration proceedings can, in effect, be taken to ratify an award by mere silence and inaction. The judgment of Eder J. in *Sin Channel Asia Ltd v Dana Shipping & Trading Pte Singapore*⁵⁶ implies that s. 72(1) AA 1996 applies both pre- and post-award, in which case s. 72(2) AA 1996 seems to have no function. This point has arguable not been challenged on appeal. We believe that such an approach invalidates the function of s. 72(2) AA 1996 and should not be followed.

3.C. SECTION 68 OF THE AA 1996

In relation to s. 68 AA 1996, it is notable that it is being used time and time again to try to grant such appeals on the basis of a procedural argument. The very recent case of *UMS Holdings Ltd v Great Station Properties SA*⁵⁷, depicts an attempt to persuade the court that an arbitral tribunal was wrong in its factual and legal conclusions. The real issue in *Great Station*⁵⁸ was whether a court can interfere on the basis that the evidence did not support the tribunal's conclusions. The court had to determine matters ancillary to the claimants' unsuccessful application to have an arbitration award set aside on the grounds of serious irregularity. The claimants applied for permission to appeal on the basis of a pre-existing conflict of opinion between judges of the commercial court as to whether, in an exceptional case, a serious irregularity within s. 68 AA 1996 could extend to a failure to take account of evidence.

⁵⁵ *Sin Channel Asia Ltd v Dana Shipping & Trading Pte Singapore* [2016] EWHC 1118 (Comm)

⁵⁶ *Sin Channel Asia Ltd v Dana Shipping & Trading Pte Singapore* [2016] EWHC 1118 (Comm)

⁵⁷ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm)

⁵⁸ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm)

Alternatively, they claimed that such conflict of opinion was "some other compelling reason" for an appeal. It was held by Teare J. that there was no real prospect of a successful appeal on the grounds of conflicting decisions as to whether overlooking evidence could be a serious irregularity under s.68 AA 1996.

In the case, Teare J. stated that the matter was not one concerning conflicting "decisions" as the opinions of Toulson J. in *Arduina Holdings BV v Celtic Resources Holdings Plc*⁵⁹ and Akenhead J. in *Schwebel v Schwebel*⁶⁰ in relation to that point were *obiter dicta*.⁶¹ He went on to state that the *obiter* comments of Toulson J. and Akenhead J. were not "some other compelling reason" for granting permission because such permission would merely cause unnecessary delay and expense which was contrary to the purpose of the AA 1996⁶² and that this was further justified, in relation to the aim of the AA 1996 to reduce unnecessary delay and expense, which in itself prompted no compelling reason for allowing an appeal.⁶³

More specifically, Teare J. did not consider that there was a real prospect of success because of the difference of judicial opinion because the court could only conclude that the Tribunal had overlooked evidence by itself considering all the relevant evidence. He went on to state that this would be an impermissible exercise as there was no suggestion in the *obiter dicta* of Toulson J. and Akenhead J. that they envisaged the court embarking upon such an exercise and because he considered it fanciful to suggest, in circumstances where it is well-established that the reach of s. 68 AA 1996 is limited, that the Court of Appeal might consider that such an exercise was an appropriate exercise for the Commercial Court to embark upon. He was of the view that when looking at the current application for permission to appeal more generally this s. 68 AA 1996 challenge was always bold and optimistic in circumstances where the reach of s. 68 AA 1996 is well known to be limited. In his judgment, in circumstances where the findings of fact made by the Tribunal are supported by substantial reasoning and it is plain that the challenges are an attempt to reverse those findings by a party who is disappointed by them, having regard to the aim of the AA 1996 to reduce unnecessary delay and expense, there was a good or compelling reason for allowing an appeal to the Court of Appeal.⁶⁴

⁵⁹ *Arduina Holdings BV v Celtic Resources Holdings Plc* [2006] EWHC 3155 (Comm)

⁶⁰ *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), [2011] 2 All E.R. (Comm) 1048

⁶¹ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), at para 3.

⁶² *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), at paras. 4-5.

⁶³ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), at para 10.

⁶⁴ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), at para 10.

Teare J. was inclined to consider the limits to a s. 68 AA 1996 challenge. He enumerated the relevant parts of s. 68 AA 1996 and examined the body of case law in relation to s.68 AA 1996 grounds for appeal. In *Lesotho Highlands Development Authority v Impregilo SpA and others*⁶⁵ Lord Steyn had referred to the "radical nature of the alteration of our arbitration law brought about by s. 68 of the 1996 Act"⁶⁶ and had noted that the irregularity relied upon must be within the closed list of categories set out in paragraphs (a) to (i) and that "nowhere in s. 68 is there any hint that a failure by the tribunal to arrive at the correct decision could afford a ground for challenge."⁶⁷

Although *Lesotho Highlands Development Authority v Impregilo SpA and others*⁶⁸ did not consider challenges to an award based upon an allegation that the tribunal had failed to consider a piece of evidence or had given insufficient weight to a piece of evidence, but other first instance decisions have done so.

In *World Trade Corporation v Czarnikow Sugar*⁶⁹ Colman J. had expressed the view that whether the arbitrators accorded to any particular evidence more weight or less weight or no weight at all was not an "issue" within the meaning of s. 68(2)(d) AA 1996 and that where arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. Similarly, Toulson J. in *Arduina v Celtic Resources Holdings PLC*⁷⁰ had considered that only when an arbitrator had genuinely overlooked evidence that really mattered, or got the wrong end of the stick in misunderstanding it, would there be a basis of a complaint under s. 68 AA 1996. In *Schwebel v Schwebel*⁷¹ Aikenhead J. said that arbitrators and awards cannot be criticised simply because they do not address each and every item of contentious or even non-contentious evidence and that it would be wrong for the court to allow a party to use s. 68 AA 1996 to challenge the decision on a question of fact. The same view was adopted by Andrew Smith J. in *Petrochemical Industries v Dow Chemical*⁷². Flaux J. in *Sonotrach v Statoil*⁷³ said that a complaint that the tribunal reached the wrong result is not a matter susceptible of challenge under s. 68 AA 1996. And this was also the approach of Field J. in *Brockton Capital LLP v Atlantic-Pacific Capital Inc*

⁶⁵ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221

⁶⁶ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221, para. 26.

⁶⁷ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221, para 29.

⁶⁸ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221

⁶⁹ *World Trade Corporation v Czarnikow Sugar* [2005] 1 Lloyd's Reports 422

⁷⁰ *Arduina v Celtic Resources Holdings PLC* [2006] EWHC 3155 (Comm)

⁷¹ *Schwebel v Schwebel* [2011] 2 AER (Comm) 1048

⁷² *Petrochemical Industries v Dow Chemical* [2012] 2 Lloyd's Reports 691

⁷³ *Sonotrach v Statoil* [2014] 2 Lloyd's Reports 252

and by Cooke J. in *New Age Alzarooni 2 Limited and another v Range Energy Natural Resources*⁷⁴.

Overall Teare J. concluded that a contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within s. 68 (2) (a) or (d) because the task of the tribunal is to decide the essential issues put to it for decision and to give its reasons for doing so and not to simply deal with all issues and evidence presented by parties and that non referral in the tribunal's reasons to a piece of evidence, does not presuppose that the tribunal has not looked at this evidence, but only suggests that the tribunal may have had a different view of the importance, relevance or reliability of the evidence presented to it, and s. 68 AA 1996 is only concerned with due process and not with the question whether the tribunal has made the "right" decision in law.⁷⁵ He gave further support to his argument by stating that to regard illogicality or irrationality by itself as a form of serious irregularity would lead to the courts examining the reasoning of an arbitral tribunal to see whether it was logical and rational, and that is not envisaged by s. 68 AA 1996. Finally, he expressed the view that even where a tribunal has overlooked evidence that might show that its finding was "wrong", this would not, by itself, show that there had been a failure of due process or a serious irregularity within s. 68 AA 1996 and concluded that an application pursuant to s. 68 AA 1996 should not be used to disguise what are in truth challenges to the tribunal's findings of fact and, hence, ruled that the s. 68 AA 1996 challenge in the case before him, had to be dismissed.

In *Ballast Wiltshier Plc (formerly Ballast Nedham Construction Ltd) v. Thomas Barnes & Sons*⁷⁶ two submissions are made on appeal, i.e. that the Arbitrator was wrong in law to order a payment of retention money and that the arbitrator was wrong in law to hold that an agreement for liquidated and ascertained damages was a penalty. The appeal was dismissed because it was felt inappropriate to disturb the award on the ground of the appeal against the finding of penalty and also because the error concerning retention money was irrelevant and in any case any exercise of discretion required in relation to that error again should not disturb the award.

In *A v. B*⁷⁷ claimants sought to challenge a partial award of three arbitrators. Claimants contended that there were serious irregularities within s. 68(2)(a) AA 1996 by reason of the tribunal's failure to comply with s. 33 AA 1996 in two respects: one in relation to its treatment

⁷⁴ *New Age Alzarooni 2 Limited and another v Range Energy Natural Resources* [2014] EWHC 4358 (Comm)

⁷⁵ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), at paras. 14-28.

⁷⁶ *Ballast Wiltshier Plc (formerly Ballast Nedham Construction Ltd) v. Thomas Barnes & Sons* [1998] EWHC Technology 306 (29th July, 1998)

⁷⁷ *A v B* [2017] EWHC 596 (Comm) (23 March 2017)

of the claimants' witnesses of fact, in that the tribunal failed to act fairly and impartially by ignoring evidence of their witnesses of fact, and in relation to the expert witnesses that the tribunal failed to act fairly and impartially between the parties by accepting the evidence of the Sellers' expert referring to a 'custom' of drying a fertiliser sample as opposed to a clear statutory requirement which expressly requires fertiliser samples be analysed without pre-drying. The court considered that there was no irregularity relevant for the purposes of s. 68(2)(i) and hence the s. 68 AA 1996 application failed and was dismissed.

In *Cordoba Holdings Ltd v Ballymore Properties Ltd*⁷⁸ the application under s.68 AA 1996 was dismissed as the question of fact was never supported by any evidence sufficient to require a conclusion and without a relevant factual finding the point of law was of hypothetical interest only and even if there was a technical failure within subsection s.68(2)(d) AA 1996 in the circumstances it could not have caused substantial injustice to any party.

In *Double K Oil Products 1996 Ltd v Neste Oil Oyj*⁷⁹ an application was made by the claimant to challenge an arbitration award made on grounds of serious irregularity under s.68 AA 1996. Blaire J. stated that in accordance with the high threshold applicable to s. 68 AA 1996,⁸⁰ it is not enough in an application under s. 68(2)(g) to show that one party inadvertently misled the other, however carelessly⁸¹ and it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct has contributed in a substantial way to the obtaining of the award. As regards figures produced just before the hearing the Court found them insufficiently clear to establish to the necessary standard of proof for fraud⁸² and there was no proof that (even if fraud was said to have been established) as a consequence of its fraud, the other party obtained an award in its favour.⁸³

In *OMV Petrom SA v Glencore International AG*⁸⁴ an appeal based on s. 68 AA 1996 for abuse of process was unsuccessful as Blaire J. held that there was undesirability in having the same matter adjudicated upon again where it would be manifestly unfair to do so, or would bring the administration of justice into disrepute.

In *Chantiers De L'atlantique SA v Gaztransport & Technigaz SAS*⁸⁵ CAT (claimant) applied under s.68(2)(g) AA 1996 to set aside an arbitration award on the grounds that it was

⁷⁸ *Cordoba Holdings Ltd v Ballymore Properties Ltd* [2011] EWHC 1636 (Ch) (30 June 2011)

⁷⁹ *Double K Oil Products 1996 Ltd v Neste Oil Oyj* [2009] EWHC 3380 (Comm) (18 December 2009)

⁸⁰ *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221 at 235H, Lord Steyn

⁸¹ *Cuflet Chartering v. Carousel Shipping Co Ltd* [2001] 1 Lloyd's Rep 707, Moore-Bick J, at [12].

⁸² *Elektrim SA v. Vivendi Universal SA* [2007] All ER (Comm) 365, Aikens J at [81]

⁸³ *Elektrim SA v. Vivendi Universal SA* [2007] All ER (Comm) 365, Aikens J at [82]

⁸⁴ *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm) (07 February 2014)

⁸⁵ *Chantiers De L'atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm) (20 December 2011)

obtained by fraud (i.e. deliberately misleading responses to disclosure requests and also deliberately misleading evidence given to the tribunal). Flaux J. stated that not disclosing specific requests does not amount to dishonesty and also does not in itself demonstrate that the award was obtained by fraud and in any case even if full disclosures had been made that would not have affected the result of the arbitration, hence neither the award was obtained by fraud or caused substantial injustice and hence the application under s.68(2)(g) AA 1996 should be dismissed.

In *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*⁸⁶ where an application was made under s.68 AA 1996 to set aside the fifth partial award of a sole arbitrator concerned with interest and costs following earlier awards, the court found that as a matter of language, context and logic "other costs" can include the costs of obtaining litigation funding and that the arbitrator's interpretation of "other costs" was correct, in that it extended in principle to the costs of obtaining third party legal funding, hence the application was dismissed.

In *CNH Global NV v PGN Logistics Ltd & Ors* [2009] EWHC B8 (Comm) permission to appeal was sought for procedural irregularity and it was not granted. Burton J stated that arbitrations are normally intended to be finite and not to be re-litigated hence leave to appeal should not be given in every case.

In *ABB Ag v Hochtief Airport GmbH & Anor*⁸⁷ the court had before it a challenge to an award. The court held that what was attempted here was a criticism of the adequacy of the reasons rather than an assertion of an irregularity such as is contemplated by s.68 AA 1996. The arbitrators had express power under the IBA Rules to exclude from production any document on the ground of lack of sufficient relevance or materiality and could not be said to have acted unfairly. Tomlinson J. went on to make a general statement that challenges to awards under ss.67 and 68 of the Act now appear to be numerous however courts will in general respect the autonomy enjoyed by arbitration.

In *Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company*⁸⁸ on a question of appeal for serious irregularity Field. J. stated that the tribunal had not mistakenly taken into account the submissions it had. Field. J. stated that as per paragraph 280 of the Departmental Advisory Committee Report on the

⁸⁶ *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)

⁸⁷ *ABB Ag v Hochtief Airport GmbH & Anor* [2006] EWHC 388 (Comm) (08 March 2006)

⁸⁸ *Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company* [2012] EWHC 1412 (Comm) (01 June 2012)

Arbitration Bill section 68 was intended for cases where it could be said that what had happened was so far removed from what could reasonably be expected of the arbitral process and that would be a retrograde step to allow appeals on fact to come in by the side door cloaked as an application for an appeal for a point of law.⁸⁹

The above examined case law allows us to conclude that s. 68 AA 1996 appeals showcase a serious trend whereby parties are over-using the appeal mechanism for serious irregularity offered by section 68 AA 1996. In Singapore and Hong Kong parties will resort to an excessive amount of use of that appeal mechanism and courts tend to issue long judgments only to justify their decision, where such appeals are in fact appeals on points of fact. The above might be enough evidence for the proposition that the right to appeal has been abused. However, the opposite view is that this is an exercise in good will i.e. in view of developing the body of the case law.

3.D. SECTION 9 OF THE AA 1996

In assessing the AA 1996 and the potential provisions in need of reform, we need ask and answer the question of whether the courts have construed the AA 1996 consistently with the Model Law or whether they gone their own way. It is believed that courts have not followed a consistent approach and a good example of the latter approach and conclusion is s.9 AA 1996 and the way it has been interpreted by Courts. The decision in *Lombard North Central plc & Anor v. GATX Corporation*⁹⁰ has provided some insight and clarification into how the English courts will interpret and implement s. 9(1) AA1996.

S. 9 AA 1996 is a depiction of the way in which English law has complied with Article II(3) of the New York Convention, which provides for the dismissal or stay of proceedings in national courts brought in breach of an agreement to arbitrate.⁹¹

In *Lombard North Central plc & Anor v. GATX Corporation*⁹² Andrew Smith J. considered an application to stay proceedings under s. 9(1) AA 1996. In reaching his determination on the s. 9(1) AA 1996 issue, Smith J. considered the meaning of the phrase “in respect of” in S. 9(1) AA 1996, noting that no judicial authority had ever directly considered the meaning of ‘in respect of’ in section 9(1) or how the court determines whether proceedings

⁸⁹ *The Magdalena Oldendorff* [2008] 1 Lloyd's Rep 7 (Waller LJ).

⁹⁰ *Lombard North Central Plc & Anor v. GATX Corporation* [2012] EWHC 1067 (Comm)

⁹¹ G. Born, *International Commercial Arbitration*, Kluwer Law International, 2009, Vol. 1, §§ 1024 - 1026.

⁹² *Lombard North Central Plc & Anor v. GATX Corporation* [2012] EWHC 1067 (Comm)

are in respect of a referred matter. He rejected the narrow approach that proceedings are in respect of” a referred matter only when they are mainly or principally resolving a dispute about a referred matter (following *Fulham Football Club (1987) Ltd v. Richards and another*⁹³). Smith J.’s decision in *Lombard North Central plc & Anor v. GATX Corporation*⁹⁴ raises two pertinent issues. First, whether proceedings are “in respect of” a matter referred to arbitration depends on the nature of the claim, but not on the formulation of the claim in the claim form or pleadings, forcing lawyers to not be able to avoid the risk of a stay under s. 9(1) AA 1996 through clever drafting. Secondly, s. 9(1) AA 1996 may bite if there is a referred “matter” in issue, even if there are other “matters” in dispute before the court that are not included within the scope of the arbitration agreement.⁹⁵ The key issue for the court is in determining how peripheral the arbitral issue has to be to the dispute as a whole before it will order a general stay of proceedings. Hence, as in *Lombard North Central plc & Anor v. GATX Corporation*⁹⁶, in cases where the parties agree to refer to arbitration only certain disputes that might arise from their contractual relationship, the risk of fragmentation of proceedings with the attendant cost and delay is inherent in the agreement, even in the post- *Fiona Trust v. Privalov & Ors*,⁹⁷ era and legal landscape where English courts are required to interpret arbitration agreements expansively.

In Singapore, as per s. 6 IAA 1994, the difference between IAA 1994 and AA 1996 is noted and it is indeed the most characteristic one between the two statutes. Under s. 6 IAA 1994 a stay of proceedings is mandatory where there is a valid and applicable arbitration clause. Under the AA 1996 this is optional.⁹⁸ S. 6(1) IAA 1994 confers upon a party to an arbitration the right to apply to the court seized of the matter for a stay of proceedings and s.6(2) IAA 1994 confers upon the court the discretion to stay the proceedings, if there are no sufficient reasons why the matter should not be referred in accordance with the arbitration agreement, and if the applicant is ready to do all things necessary to the proper conduct of the arbitration. The general presumption is in favour of a stay, as per holdings in *Fasi v. Speciality Laboratories Asia Ltd (No. 1)*⁹⁹, *Kwan Im Tong Chinese Temple v. Fong Chung Han*

⁹³ *Fulham Football Club (1987) Ltd v. Richards and another* [2011] EWCA Civ 855

⁹⁴ *Lombard North Central plc & Anor v. GATX Corporation* [2012] EWHC 1067 (Comm)

⁹⁵ In such a scenario, the court can adopt one of two approaches. It may stay the entire proceedings pending the outcome of the arbitration, or alternatively, it may allow the general court proceedings to carry on, but stay only the discrete arbitral matter.

⁹⁶ *Lombard North Central plc & Anor v. GATX Corporation* [2012] EWHC 1067 (Comm)

⁹⁷ *Fiona Trust v. Privalov & Ors* [2006] EWHC 2583 (Comm).

⁹⁸ R. Merkin & J. Hjalmarsson, *Singapore Arbitration Legislation Annotated*, 2nd Ed., Informa, 2016, 194.

⁹⁹ *Fasi v. Speciality Laboratories Asia Ltd (No. 1)* [1999]4 SLR 488

*Construction Pte Ltd*¹⁰⁰, *JDC Corporation v. Lightweight Concrete Pte Ltd*¹⁰¹, *Multiplex Constructions Pty Ltd v. Sintal Enterprise Pte Ltd*¹⁰², *Car & Cars Pte Ltd v. Volkswagen AG*¹⁰³, and the position is the same in Hong Kong, as per *Cheuk King Trading Ltd v. Prodential Mall Ltd*¹⁰⁴. In more recent cases, such as *Sim Chay Koon v. NTUC Income Insurance Co-operative Ltd*,¹⁰⁵ the Court of Appeal restated the guiding principle that, absent exceptional circumstances, jurisdictional questions should in the first instance be left to the arbitrators and that the discretion to refuse a stay should be rarely exercised.¹⁰⁶

Reasons justifying the refusal of a stay are sparse such as the case where the claimant may have been forced into liquidation by the defendant's breach of contract and cannot afford to arbitrate¹⁰⁷, or the case where the dispute involves several parties but the arbitration clause does not apply to all of them¹⁰⁸, or where not all of the raised issues fall within the arbitration clause so that the matter should be disposed of in a single judicial forum. The court has the power to impose conditions upon a grant of stay. In *Drydocks World-Singapore Pty Ltd v. Jurong Port Pte Ltd*¹⁰⁹ it was held that the same approach should prevail under IAA 1994 and AA 1996 even if stays are discretionary under the AA 1996 as opposed to being mandatory under the IAA 1994. The principle to be adopted is that purporting to unconditional stays unless there exist exceptional circumstances such as e.g. a risk that the defendant will have a limitation defence in the arbitration proceedings. It follows, that courts have adopted a rather disperse and fragmented approach, and have construed the AA 1996 non-consistently with the Model Law. This altogether makes the need for reform of the law to align it with the Model Law, even more imperative.

The standards by which courts evaluate arbitration clauses often vary according to the procedural context in which the clauses present themselves. Much depends on what might be called the "mechanics" of judicial review, with some countries applying different criteria to pre-award and post-award judicial scrutiny, to distinguish between *prima facie* and full review.

¹⁰⁰ *Kwan Im Tong Chinese Temple v. Fong Chung Han Construction Pte Ltd* [1998]2 SLR 137

¹⁰¹ *JDC Corporation v. Lightweight Concrete Pte Ltd* [1999]1 SLR 615.

¹⁰² *Multiplex Constructions Pty Ltd v. Sintal Enterprise Pte Ltd* [2005]2 SLR 530

¹⁰³ *Car & Cars Pte Ltd v. Volkswagen AG* [2009] SGHC 233

¹⁰⁴ *Cheuk King Trading Ltd v. Prodential Mall Ltd* [1996]4 HKC 758

¹⁰⁵ *Sim Chay Koon v. NTUC Income Insurance Co-operative Ltd* [2015] SGCA 46

¹⁰⁶ See Merkin & Hjalmarsson above, 195.

¹⁰⁷ *Grant Constructions Pty Ltd. v. Claron Constructions Pty Ltd* [2006] NSWSC 369.

¹⁰⁸ *Hua Xin Innovator Incubator Pte Ltd v. IPCO International Ltd* [2012] SGHC 273; See also *Linfield Ltd v Taoho Design Architects Ltd* [2002] HKC 204; *Vasp Group Pty Ltd v. Service Stream Ltd* [2008] NSWSC 1182.

¹⁰⁹ See Merkin & Hjalmarsson above, 194-196; *Drydocks World-Singapore Pty Ltd v. Jurong Port Pte Ltd* [2010] SGHC 185.

On occasion, legal systems permit jurisdictional challenges brought in the course of court actions but deny requests for declarations about ongoing arbitrations. In some instances, a court will address jurisdiction differently depending on whether or not the arbitration has actually begun.¹¹⁰ Under German law, if the arbitration was in progress the arbitrators would simply rule on their own jurisdiction and proceed with the case. Judicial pronouncement on the allegedly defective arbitration clause would await challenge to an award, whether partial or final.¹¹¹

Matters get even more complicated in legal systems where different standards of review apply according to the procedural posture of the arbitration. French judges, for example, asked to hear a claim can address the validity of an arbitration clause *only* in the most superficial manner, and *only* in the event no arbitral tribunal has been constituted. At that point the court can ask whether the clause was clearly void, but must put off until later any more complex questions. Once the arbitration has started, however, judges must sit on their hands until the award is made, when they provide a full examination of alleged defects in the arbitration clause.¹¹²

In some countries, courts distinguish between arbitration held at home or abroad. Swiss courts, for example, make a full and comprehensive review of the validity of the arbitration clause when the arbitration has its seat abroad. By contrast, when the arbitration is held in Switzerland, judges engage only in a summary examination of arbitral jurisdiction. Full review must wait until the award stage. In other nations (e.g. USA) courts engage in full examination of arbitral power regardless of whether the arbitration has begun, and irrespective of whether they are being asked to hear the merits of the claims. The court might decide that the lawsuit should stop and the arbitration should proceed. Or vice versa. Or, the court might pass this jurisdictional question back to the arbitrators themselves for their determination.

Is the judge's role preventive or remedial? As a general matter, pre-award requests for declarations and injunctions implicate a *preventive* role for courts. The jurisdictional foundation of an arbitral proceeding must be monitored before anyone knows what the arbitrator will decide. The arbitrator's jurisdiction becomes an issue because judges are asked

¹¹⁰ In systems that permit injunctions, like the United States, motions for declarations related to arbitrations would likely be combined with motions to enjoin or to compel the arbitral proceedings; W.W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, ICCA Congress, Montréal 2006, 13 ICCA Congress Series 55, 8-156, 20.

¹¹¹ German ZPO Article 1032(1) and Article 1032(2).

¹¹² NCPC, Article 1458, permitting pre-arbitration review only to determine if the arbitration clause is *manifestment nulle*. Standards for judicial review are contained in other provisions, for example Article 1502 for international arbitration.

to make a respondent participate, or to tell a claimant that the arbitration lacks jurisdictional foundation. By contrast, when arbitral jurisdiction becomes an issue in the endgame, after an award is rendered, judges exercise a *remedial* function, correcting mistakes that allegedly occurred earlier in the arbitral process. The validity of an award might be subject to judicial scrutiny at the arbitral seat, through motions to vacate or to confirm under local law.¹¹³ Or the award might be subject to scrutiny when presented for recognition abroad, by a winning claimant seeking to attach assets or a prevailing respondent asserting the award's *res judicata* effect to block competing litigation.¹¹⁴

4. THE MODEL LAW AND THE NEED FOR AN ADOPTION OF AN INTERNATIONAL APPROACH – PROOF FROM OTHER JURISDICTIONS

In Singaporean jurisprudence, in *Tang Boon Jek Jeffrey v. Tan Po Leng Stanley*¹¹⁵ the question at issue was whether the arbitrator could reconsider substantive issues previously resolved in an award rendered in the same proceedings.

The approach followed by the court of Appeal in this case is exemplary in many respects. The court began its interpretive work with the *travaux préparatoires*, the tenor of which it confirmed by having recourse to international commentary. It noted that English authorities have little relevance because England is not a Model Law jurisdiction,¹¹⁶ but such an approach is not entirely representative of the court's interpretive output. The Model Law's *travaux préparatoires* are mentioned by the court of Appeal in five other cases, namely *NCC International AB v. Alliance Concrete Singapore Pte Ltd*,¹¹⁷ *Swift-Fortune Ltd v. Magnifica Marine SA*,¹¹⁸ *PT Assuransi Jasa Indonesia (Persero) v. Dexia Bank SA*,¹¹⁹ *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd*,¹²⁰ and *PT First Media TBK v. Astro Nusantara International BV*.¹²¹

More recently, the court gave what is probably its strongest signal to date that the interpretation of the Model Law demands an international approach. In *PT First Media TBK v.*

¹¹³ *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

¹¹⁴ W.W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, ICCA Congress, Montréal 2006, 13 ICCA Congress Series 55, 8-156, 20-25.

¹¹⁵ *Tang Boon Jek Jeffrey v. Tan Po Leng Stanley* [2001] SGCA 46

¹¹⁶ *PT Garuda Indonesia v. Birgen Air* [2002] SGCA 12.

¹¹⁷ *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5.

¹¹⁸ *Swift-Fortune Ltd v. Magnifica Marine SA* [2007] 1 SLR(R) 629 [Swift-Fortune].

¹¹⁹ *PT Assuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41 [Asuransi Jasa].

¹²⁰ *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

¹²¹ *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57

Astro Nusantara International BV,¹²² the court was called upon, first, to decide on the interpretation of s. 19, a provision of the IAA 1994 governing the enforcement of international awards made in Singapore. The question was whether, and on what grounds, the courts have the power to refuse enforcement of an award under that provision. The court also had to determine whether a failure to challenge before the courts an arbitral ruling in favour of jurisdiction under art. 16(3) of the Model Law precluded a party from raising a question of jurisdiction when resisting enforcement. The court found that enforcement could be refused under s. 19, that the grounds for refusal ought to be modelled on those of the Model Law, and that art. 16(3) of the Model Law was not a ‘one-shot’ remedy precluding a party from raising an issue of jurisdiction when resisting enforcement. In the view of the court, the adoption of the Model Law had heralded a ‘sea change’ and meant that the power to refuse enforcement under s. 19 had to be exercised in a manner which is compatible with the overarching philosophy of the Model Law on the enforcement of awards. Indeed, the harmonization aspect of the Model Law would best be achieved if all judges thought like international judges.

Courts must avoid the mistake of mechanically ascribing a meaning derived purely from domestic sources. Art. 5 of the Model Law makes it clear that no court intervention should be allowed unless the Model Law provides for it. This principle is important in common law systems and this is also why the Court of Appeal decision in *NCC International AB v. Alliance Concrete Singapore Pte*¹²³ is so important. This decision took care of an important aspect of harmonisation by ensuring certainty for both arbitral parties and arbitrators, as to the instances in which curial supervision or assistance is to be expected, i.e. not only for local practitioners but also for foreign parties and arbitrators. Although most Model Law jurisdictions are part of the civil law family, the persuasive force of common law precedents and Model Law precedents can and do overlap, and may combine to form a favoured frame of reference. This is easily and strikingly illustrated by a list of Model Law countries whose judicial decisions are referred to

¹²² *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57

¹²³ *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5.

by the Singapore Court of Appeal: Australia,¹²⁴ Canada,¹²⁵ Hong Kong,¹²⁶ India,¹²⁷ Malaysia,¹²⁸ and New Zealand.¹²⁹

In Australia, in *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd*¹³⁰ Murphy J. of the Federal Court held that s. 21 has retrospective effect with the result that every international arbitration agreement with an Australian seat, whenever entered into, is subject to the Model Law. By contrast, the Western Australian Court of Appeal in *Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd*¹³¹ suggested that the Model Law will not apply retrospectively to an arbitration agreement entered into before 6 July 2010, in particular, where the dispute between the parties has crystallized and arbitral proceedings have been commenced before that date. The Western Australian court's analysis, which is very persuasive, is that parties have vested rights in the application of a particular arbitration regime which they may have consciously chosen and which would be adversely affected by retrospective application of a new law. This approach has been also adopted by Pritchard J. of the Supreme Court of Western Australia and applied to a case where the arbitral proceedings were commenced after 6 July 2010.¹³²

In the Hong Kong case of *Astro Nusantara International BV and Ors v. PT Ayunda Prima Mitra and Ors*¹³³ a defendant failed to challenge a Singaporean tribunal's preliminary award on jurisdiction in the supervising Singapore courts, and instead kept its jurisdictional point in reserve to be deployed at the enforcement stage. The defendant engaged with the tribunal and - believing it had no assets in Hong Kong - did not initially challenge the claimant's

¹²⁴ *Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd* [2007] 2 SLR 268; *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR(R) 382; *PT First Media TBK v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372.

¹²⁵ *Tjong Very Sumito and others v. Chan Sing En and others* [2012] SGHC 125; *Carona Holdings Pte Ltd v. Go Go Delicacy Pte Ltd*, [2008] SGCA 34; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, [2007] SGCA 28; *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR (R) 382

¹²⁶ *Tjong Very Sumito and others v. Chan Sing En and others* [2012] SGHC 125; *Carona Holdings Pte Ltd v. Go Go Delicacy Pte Ltd*, [2008] SGCA 34; *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565; [2008] SGCA 5; *Swift-Fortune Ltd v. Magnifica Marine SA* [2007] 1 SLR 629; [2006] SGCA 42; *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55; *PT First Media TBK v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372; [2013] SGCA 57.

¹²⁷ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597; [2006] SGCA 41

¹²⁸ *Carona Holdings Pte Ltd v. Go Go Delicacy Pte Ltd*, [2008] SGCA 34.

¹²⁹ *Tjong Very Sumito and others v. Chan Sing En and others* [2012] SGHC 125; *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565; [2008] SGCA 5; *Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd* [2007] 2 SLR 268; *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597; [2006] SGCA 41; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, [2007] SGCA 28.

¹³⁰ *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21.

¹³¹ *Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd* (2012) 287 ALR 315

¹³² *Hancock Prospecting Pty Ltd v. Hancock* [2013] WASC 290

¹³³ *Astro Nusantara International BV and Ors v. PT Ayunda Prima Mitra and Ors* HCCT 45/2010.

application for enforcement in Hong Kong of an award in its favour. Subsequently the claimant attached receivables due to the defendant in Hong Kong, and the defendant applied for an order to set aside the enforcement. Although grounds for refusal to enforce the award were otherwise made out, the Hong Kong court exercised its discretion to allow enforcement on the basis that the defendant and award debtor had breached a principle of good faith in its failure to pursue its jurisdictional point while the SIAC arbitration was ongoing, and also due to the deliberate delay in the defendant's decision to contest enforcement in Hong Kong. On 8 December 2015, Chow J. granted leave to the defendant to appeal against the Hong Kong decision to refuse to extend time to contest the enforcement proceedings. This practically means that the debate over the 'transnational' nature of arbitration law continues to run.

Singapore is generally and rightly recognised as one of the most arbitration-friendly jurisdictions in the world. This reputation is due to its pro-arbitration stance¹³⁴. This pro-Model Law stance apart, it is submitted, however, that the need to harmonise the due process standard of the Model Law should be taken more seriously, even if the IAA 1994 refers to the rules of natural justice rather than the right to be treated with equality and given a full opportunity of presenting a case. Singapore is widely acknowledged as an arbitration super-model: a model for all Model Law jurisdictions. Its approach to the Model Law is exemplary and should serve as a sound basis of providing grounds for its adoption in England.

In Australia, in 1989 the Australian Federal Parliament amended the IAA by enacting the Model Law in s. 16 and Schedule 2 of the IAA. In the 2010 amendments to the IAA the Australian Federal Parliament also adopted many of the 2006 revisions to the Model Law made by UNCITRAL.¹³⁵

In Hong Kong, the Ordinance which took effect on 1 June 2011, governs the arbitration regime in Hong Kong and is largely based on the UNCITRAL Model Arbitration Law (with the amendments adopted into the UNCITRAL Model Arbitration Law in 2006). The New Arbitration Ordinance in Hong Kong is promising to have a significant impact on arbitration practice in Hong Kong. In effect, the introduction of a regime governed by international principles based on the Model Law aligns Hong Kong's arbitration regime more closely to international practice, whilst the opt-in provisions mean that Hong Kong will continue to retain two distinct regimes, which practitioners and parties will need to be aware of.

¹³⁴ Q. Loh, *UNCITRAL Model Law and the Pro-arbitration Approach: Judicial Internationalism and International Interpretation; The Singapore Experience*, in F. Bachand & F. Gélinas, Eds, *The UNCITRAL Model Law after 25 Years: Global Perspectives on Arbitration Law* (New York: Juris, 2013) 185, 186.

¹³⁵ R. Garnett, *Australia's International and Domestic Arbitration Framework*, Ch. 2, 7 in G.A. Moens and P. Evans (Eds.), *Arbitration and Dispute Resolution in the Resources Sector*, Springer, 2015.

All jurisdictions who have enacted the Model Law are streamlined towards promoting an international approach in the interpretation of the Model Law. In this way, the international element is solidly established and entrenched in arbitration and uniformity is promoted.

4. THE ARGUMENT IN FAVOUR OF REFORM

In the UK, the DAC had rejected the Model Law on the basis that commercial arbitration is a field in which there is a plethora of case law and where the most intrusive features of judicial intervention have been rationally modified by legislation; therefore, the Model Law would only be a credible candidate for adoption if its provisions on careful analysis disclosed a regime which was likely to be more satisfactory than English law as it now stands.

The DAC was of the overall view that most of the trading nations had not chosen to seek harmonisation and that there would be disadvantages in introducing a new and untested regime for international commercial arbitration, however, given the codified-style framework that the Model Law provides, jurisdictions will continue to adopt it and adhere to its provisions to suit the needs of the parties they are seeking to attract. This is further dictated by the fragmented approach of common law legislations, in particular the AA 1996 in dealing with important aspects of the arbitration proceedings such as issues on jurisdiction (s. 30 AA 1996) or issues on stay of proceedings (s. 9 AA 1996) or issues relating to the conditions for setting aside an award (ss. 67, 68), all of which constitute demonstrable evidence not only of the fragmented approach in various issues relating to the arbitral proceedings in the various jurisdictions (as opposed to the one uniform approach in the same issues as per the Model Law) but also of the unsatisfactory status of English statute law on arbitration because of its wide disparity.

UNCITRAL reported that the new Law on Arbitration of Mongolia, which was published on 17 February 2017, is considered an enactment of the Model Law, with amendments as adopted in 2006. With this new law, arbitral legislation based on the Model Law has been adopted in 74 States in a total of 104 jurisdictions.¹³⁶ The Model Law was created as a suggested framework to assist States in modernizing their arbitral laws. Lawmakers can consider adopting the Model Law in its entirety, as part of the State's legislation. However, States enacting legislation based on the Model Law also have the flexibility to depart from the text, and are not forced to inform the UNCITRAL Secretariat in case of such departure. That

¹³⁶ International Arbitration Law, *74 Jurisdictions Have Adopted The UNCITRAL Model Law to Date*, News, March 01, 2017, <http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/>

said, it remains that a majority of States now follow the Model Law and this provides more security to investors in case of conflicts.¹³⁷, ¹³⁸

For London to make itself more attractive than other seats to foreign legal practitioners and their clients who make use of international arbitration, it needs to be able to offer a legal regime that is not domestic focused. Thus, the law needs be familiar to the foreign practitioner who will be able to recognize the law as a well-known set of rules and provisions, thus mitigating the fear of any hidden local particularities. The Model Law is an instrument which was purposely conceived to assist states in reforming and modernizing their laws on arbitral procedure. It is also acceptable to states of all regions and the different legal or economic systems of the world and, since its adoption by UNCITRAL, has come to represent the accepted international legislative standard for a modern arbitration law. This is the reason why a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

5. CONCLUSIONS

In the UK, the DAC had rejected the Model Law on the basis that commercial arbitration is a field in which there is a plethora of case law and where the most intrusive features of judicial intervention have been rationally modified by legislation, and on the basis that London already attracts a significant number of international arbitration proceedings, yet without the Model Law. This is not enough justification as uniformity is not as such promoted. Moreover, other common law jurisdictions have already entrusted their eminence as arbitral hubs by enacting the Model Law in their legislation. Singapore has demonstrated a sensitiveness to the needs of international arbitration by supporting the Model Law. The approach followed in *Tang Boon Jek Jeffrey v. Tan Po Leng Stanley*¹³⁹ reaffirms Singapore's stance as a friendly-to-arbitration jurisdiction which is refusing to inject any domestic practices or consideration into the construction of such a Model Law. Similarly, in Australia, the 2010 amendments are simply an ameliorated version of the Model Law aimed to better protect parties choosing to arbitrate. In Hong Kong, the New Arbitration Ordinance is based much upon the Model Law and aims to align Hong Kong's arbitration regime more closely to international practice.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Tang Boon Jek Jeffrey v. Tan Po Leng Stanley* [2001] SGCA 46

The above argument apart, there is other good reason prompting for the need to reform the law of arbitration in England. In particular, as our discussion has demonstrated the vastly fragmented body of case law on eminent issues, constitutes ample evidence that not only has the AA 1996 failed to codify the vast proportion of common law authority but, also, that there are numerous cases where the scope of the AA 1996 is sought to be abused by parties as per their interest. *Great Station*¹⁴⁰, *Lesotho Highlands*¹⁴¹, *Czarnikow*¹⁴², *Arduina*¹⁴³, *Schwebel*¹⁴⁴, *Petrochemical Industries*¹⁴⁵, *Sonotrach*¹⁴⁶, *Brockton Capital*¹⁴⁷, *New Age*¹⁴⁸ *Ballast Wiltshier Plc (formerly Ballast Nedham Construction Ltd) v Thomas Barnes & Sons*¹⁴⁹, *A v B*¹⁵⁰, *Cordoba Holdings Ltd v Ballymore Properties Ltd*¹⁵¹, *OMV Petrom SA v Glencore International AG*¹⁵², *Chantiers De L'atlantique SA v Gaztransport & Technigaz SAS*¹⁵³, *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*¹⁵⁴, *CNH Global NV v PGN Logistics Ltd & Ors*, *ABB Ag v Hochtief Airport GmbH & Anor*¹⁵⁵ and *Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company*¹⁵⁶ hold evidence of such an attempt by the parties to abuse the scope of s. 68 AA 1996 and hence harm the character and reputation of arbitration as a solid mechanism of alternative dispute resolution and reiterate the need for England to reform arbitration law and adopt the Model Law. In Singapore and Hong Kong as our discussion has shown, parties will resort to an excessive amount of use of that appeal mechanism and courts tend to issue long judgments only to justify their decision, where such appeals are in fact appeals on points of fact. It is therefore logical to conclude that the right to appeal has been abused. Notwithstanding the above valid arguments appeals should be allowed for valid reasons to allow get the law into courts via the body of case law and hence have the law developed. However, this is an exercise in need to have strict exact criteria set forth, hence the need for a reform in arbitration law.

¹⁴⁰ *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm)

¹⁴¹ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221

¹⁴² *World Trade Corporation v Czarnikow Sugar* [2005] 1 Lloyd's Reports 422

¹⁴³ *Arduina v Celtic Resources Holdings PLC* [2006] EWHC 3155 (Comm)

¹⁴⁴ *Schwebel v Schwebel* [2011] 2 AER (Comm) 1048

¹⁴⁵ *Petrochemical Industries v Dow Chemical* [2012] 2 Lloyd's Reports 691

¹⁴⁶ *Sonotrach v Statoil* [2014] 2 Lloyd's Reports 252

¹⁴⁷ *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459

¹⁴⁸ *New Age Alzarooni 2 Limited and another v Range Energy Natural Resources* [2014] EWHC 4358 (Comm)

¹⁴⁹ *Ballast Wiltshier Plc v. Thomas Barnes & Sons* [1998] EWHC Technology 306 (29th July, 1998)

¹⁵⁰ *A v B* [2017] EWHC 596 (Comm) (23 March 2017)

¹⁵¹ *Cordoba Holdings Ltd v Ballymore Properties Ltd* [2011] EWHC 1636 (Ch) (30 June 2011)

¹⁵² *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm) (07 February 2014)

¹⁵³ *Chantiers De L'atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm)

¹⁵⁴ *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)

¹⁵⁵ *ABB Ag v Hochtief Airport GmbH & Anor* [2006] EWHC 388 (Comm) (08 March 2006)

¹⁵⁶ *Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company* [2012] EWHC 1412 (Comm) (01 June 2012)